

IN THE PUBLIC PROCUREMENT APPEALS AUTHORITY

APPEAL CASE NO. 32 OF 2015-16

BETWEEN

M/S EA BROTHERS CONTRACTORS CO. LTD.....APPELLANT

AND

MZUMBE UNIVERSITY.....RESPONDENT

DECISION

CORAM

- |                              |   |                 |
|------------------------------|---|-----------------|
| 1. Ms. Monica P. Otaru       | - | Ag. Chairperson |
| 2. Mrs. Rosemary A. Lulabuka | - | Member          |
| 3. Eng. Aloys J. Mwamanga    | - | Member          |
| 4. Ms. Florida Mapunda       | - | Ag. Secretary   |

SECRETARIAT

- |                           |   |               |
|---------------------------|---|---------------|
| 1. Ms. Violet S. Limilabo | - | Legal Officer |
|---------------------------|---|---------------|

FOR THE APPELLANT

- |                           |   |                     |
|---------------------------|---|---------------------|
| 1. Mr. Edward P. Shayo    | - | Managing Director   |
| 2. Mr. Wambura M. Wambura | - | Procurement Expert  |
| 3. Mr. Aron S. Mugisha    | - | Sales and Marketing |
|                           |   | Manager             |

## FOR THE RESPONDENT

- |                       |                                 |
|-----------------------|---------------------------------|
| 1. Mr. Reginald Taabu | - Head of PMU Mzumbe University |
| 2. Ms. Evelina Kweka  | - Legal Officer                 |
| 3. Mr. Amon Jason     | - Building and Estates Officer  |

This Decision was set for delivery today 22<sup>nd</sup> July 2016, and we proceed to deliver it.

This Appeal was lodged by M/s EA BROTHERS CONTRACTORS CO. LTD. (hereinafter referred to as "the Appellant") against MZUMBE UNIVERSITY (hereinafter referred to as "the Respondent").

The Appeal is in respect of Tender No. PA/013/2015-2016/GWND/26 for Supply, Installation, Testing and Commissioning of Air Conditioning in the Selassie Building at Mzumbe University Main Campus (hereinafter referred to as "the Tender").

According to the documents submitted to the Public Procurement Appeals Authority (hereinafter referred to as "the Appeals Authority"), the facts of the Appeal may be summarized as follows:

The Respondent vide the Daily News newspaper dated 19<sup>th</sup> February 2016, invited tenderers to submit quotations, deadline for which was 15<sup>th</sup> March 2016. The Tender was conducted using the National Competitive Bidding (NCB) procedures specified in the Public Procurement Regulations of 2013

(hereinafter referred to as "GN. No. 446 of 2013"). Eight tenders were received.

After the tender opening ceremony, tenders were subjected to evaluation, which was conducted in three stages namely; Preliminary Evaluation, Detailed Evaluation and Correction of Errors. During Preliminary Evaluation, the Appellant's and three (3) other tenders were found to be non responsive thus were disqualified.

The remaining tenders were subjected to further evaluation whereby on 18<sup>th</sup> April 2016 the Tender Board approved the award of the Tender to M/s Bright Technical Systems and General Supplies Ltd., at a contract price of TZS. 189,372,300.00 (VAT inclusive).

Aggrieved by the Respondent's decision, on 13<sup>th</sup> June 2016, the Appellant lodged this Appeal.

#### SUBMISSIONS BY THE APPELLANT

The Appellant raised two grounds of Appeal which may be summarized as follows:-

- i. That, the Respondent did not issue a notice of intention to award the Tender within three (3) weeks as they promised, until after they requested to know the status of the Tender.
- ii. That, the submission of a bank statement was not necessary as they had attached all relevant documents indicating financial capability to perform the contract including the financial statement and evidence

of access to a bank loan in accordance to Regulation 116 (a) of GN. No. 446 of 2013. As a result of which their disqualification was unfounded.

In support of the first ground, the Appellant claimed that they requested for the status of the Tender from the Respondent vide a letter with Ref. No. EA 03/15/MRK/2016 dated 2<sup>nd</sup> May 2016, after receiving no response within the promised time of 3 weeks. On 10<sup>th</sup> May 2016 they received an e-mail attached with the notice of intention to award the tender dated 21<sup>st</sup> April 2016, which notified all tenderers, the Appellant inclusive, of the intention to award the Tender to M/s Bright Technical Systems and General Supplies Ltd.; and that the Appellant was disqualified for failure to submit CRB Registration Certificate as per Clause 11.1 h (i) of the Tender Document.

Dissatisfied, the Appellant applied for administrative review via a letter dated 16<sup>th</sup> May 2016, challenging the disqualification, claiming that they had submitted the CRB Registration Certificate together with all other required documentation.

The Respondent vide a letter with Ref. No. MU/CF/CB.2/8/VOL.XIX/74 dated 27<sup>th</sup> May 2016 made a correction, stating that disqualification was due to failure to submit a bank statement as per Clause 11. 1 h (i) of the Instructions to Tenderers (ITT) and not the CRB Registration Certificate.

In support of the second ground, the Appellant submitted that, bank statements only show history of bank transactions done on a particular

bank account for a specified period, but does not represent the worth of the account holder or prove financial capability of the account holder. As such, a bank statement does not add value to qualification information and it was irrelevant to be mentioned in this Tender as one of the criteria.

Finally the Appellant prayed for the following relieves:

- i. The Respondent to re-evaluate all tenders afresh in observance of the law;
- ii. The Respondent to compensate the Appellant a total sum of TZS. 5,200,000.00 as per the following breakdown;
  - (a) Appeal filing fees.....TZS. 200,000.00
  - (b) Legal Fees.....TZS. 5,000,000.00
- iii. The Appeals Authority to take any other decision it deems necessary.

## THE RESPONDENT'S SUBMISSIONS

In response to the grounds of the Appeal, the Respondent submitted as follows;

On the first ground, the Respondent categorically stated that they had sent the notice of intention to award within three days after the approval of the Tender Board by postal mail. That, the same was re-sent as an e-mail attachment after the Appellant claimed not to have received the said letter.

On the second ground, the Respondent submitted that, the Appellant was disqualified due to failure to submit a bank statement; a criteria that was stated under Clause 11.1h (i) of the ITT and consistent with the Evaluation Report. That, all tenderers were required to comply with this requirement in order to measure the liquidity of tenderers.

The Respondent submitted further that, the evaluation process complied with Regulation 203 (1) of GN. No. 446 of 2013 which requires the evaluation of tenders to be consistent with the terms and conditions set out in the Tender Document, and that the Appellant's failure to submit the required document led to disqualification as per Regulation 204 (2) (k) of GN. No. 446 of 2013. Therefore the Appellant was fairly disqualified.

Finally the Respondent prayed for dismissal of the Appeal for lack of merits.

#### **ANALYSIS BY THE APPEALS AUTHORITY**

In this Appeal there are three issues which call for determination. These are:-

- 1.0 Whether the notice of intention to award issued was contrary to the law;
- 2.0 Whether the Appellant was unfairly disqualified; and
- 3.0 To what reliefs, if any, are the parties entitled.

Having identified the issues, the Appeals Authority proceeded to determine them as hereunder-

1. 0 Whether the notice of intention to award issued was contrary to the law;

In determining this issue, the Appeals Authority considered the submissions by both parties as well as the applicable law.

The Appellant wrote to enquire about the status of the Tender on 2<sup>nd</sup> May 2016. On 10<sup>th</sup> May 2016, they received an e-mail which attached the said notice of intention to award, which the Respondent claimed to have been re-sent. Dissatisfied with the Tender result, the Appellant sought for administrative review as per Section 96 of the Public Procurement Act, 2011 (hereinafter referred to as "the Act").

According to the sequence of events, the tender opening ceremony took place on 15<sup>th</sup> March 2016; the Tender Board approved the award of the tender to M/s Bright Technical Systems and General Supplies Ltd on 18<sup>th</sup> April 2016; the notice of intention to award was written on 21<sup>st</sup> April 2016, (which the Respondent claimed to have sent via the post); and a copy of the notice of intention to award was resent via e-mail on 10<sup>th</sup> May 2016.

The Appellant failed to show the provisions of law that required the Respondent to notify tenderers the results of tender evaluation within three weeks. The Appellant insisted on their argument based on the statement delivered on the tender opening ceremony, that they will be notified on the

tender results within three weeks. Further, they claimed that the delay had prejudiced their right to appeal under S.60(3) of the Act.

The Appeals Authority thoroughly considered submissions by the parties as well as the sequence of events as narrated herein and observed that although the Respondent did not show evidence of delivery of the notice as claimed, the Appellant received the same on 10<sup>th</sup> May 2016, well within the bid validity period which was 120 days and was availed all the necessary steps for legal redress.

The Appeals Authority therefore concludes that as the notice of intention to award issued was not issued contrary to any law, the Respondent acted within the legal parameters; neither was the Appellant prejudiced in any way whatsoever. As such, this issue is answered in the negative and therefore the first ground of Appeal is dismissed.

## 2. 0 Whether the Appellant was unfairly disqualified;

As per the Evaluation Report, the Appellant's tender was disqualified for failure to submit a bank statement.

In resolving this issue, the Appeals Authority considered the Appellants' contention that the bank statement does not add value to qualification information and that it was irrelevant to be mentioned in this Tender as one of the criteria.

The requirement of the bank statement, among others, was clearly indicated under Clause 11.1h (i) of the ITT, which the Appellant admitted

to have based their tender on. In the event of any clarification Clause 8 of the ITT and Regulation 13 of GN. No. 446 of 2013 gives room to tenderers to seek for the same from the Procuring Entity at any time before the tender opening ceremony. When asked if they had at any time before submission of their tender, communicated in writing their views and/or requested for clarification from the Respondent, the Appellant stated that this was never done.

In considering arguments by both parties herein, the Appeals Authority is therefore of a considered view that since the Appellant had not raised their views concerning the bank statement that would enable the Respondent make clarifications, they were bound to comply fully with this requirement.

From the above analysis, the Appeals Authority is of a considered view that since the Appellant's failure to submit the required document led to disqualification as per Regulation 204 (2) (k) of GN. No. 446 of 2013, the evaluation process was consistent with the terms and conditions set out in the Tender Document. As such, the evaluation was in compliance with Regulation 203 (1) of GN. No. 446 of 2013. Therefore, this issue is answered in the negative, that the Appellant was fairly disqualified.

### 3. 0 To what reliefs, if any, are the parties entitled;

As both issues above are answered in the negative, this Appeal lacks merits and it is therefore hereby dismissed. Each party to bear own costs.

This Decision is binding upon the parties and may be enforced in any court of competent jurisdiction in terms of Section 97 (8) of the Act.

The Right of Judicial Review as per Section 101 of the Act is explained to the Parties.

This Decision is delivered in the presence of the Appellant and the Respondent, this 22<sup>nd</sup> July, 2016.

*M. Otaru*  
-----  
MS. MONICA P. OTARU  
Ag. CHAIRPERSON

MEMBERS:

1. MRS. ROSEMARY A. LULABUKA ..... *Lulu*
2. ENG. ALOYS J. MWAMANGA ..... *Mwamanga*